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ABSTRACT

Concerns about student resegregation resulting from discriminatory student grouping practices are highlighted in this paper. Part 1 determines the characteristics of discriminatory ability grouping and tracking practices through a content analysis of 35 Office for Civil Rights (OCR) case file documents for the fiscal years 1983-89. Twenty-three out of 35 investigations used disparate impact analysis. Explanations are offered for how the OCR uses disparate impact analysis and disparate treatment analysis and reasons why the OCR found ability grouping to be discriminatory. The second part assesses the extent to which ability grouping is discriminatory in the nation's elementary and secondary schools through an analysis of national survey data conducted by the Center for Research on Elementary and Middle Schools (CREMS) and the OCR. Findings indicated a disproportionate number of racially identifiable classes. The third part formulates policy recommendations and concludes that disagreement exists between the General Accounting Office and Department of Education on providing federal guidance to student and local education agencies. One table is included. Appendixes explain the OCR's discretion for using disparate treatment or impact analysis and provisions on ability grouping in the Emergency School Aid Act. (21 footnotes) (LMI)

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The Characteristics of Discriminatory Ability Grouping and Evidence of its Extent

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Paper Presented at the Annual Meeting of the
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BACKGROUND

A disproportionate number of minority students in our nation's public elementary and secondary schools are in lower-ability classes and special education programs. This has led to concern about student resegregation resulting from discrimination within schools. Such within-school discrimination may result when schools inappropriately use educational practices or intentionally treat students differently because of race, color, or national origin.

Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color, or national origin in federally funded educational programs and activities. The Office for Civil Rights (OCR) of the Department of Education is responsible for ensuring that educational institutions receiving federal funds comply with Title VI and other federal civil rights statutes.[1]

This paper is based on a broader study of the Office for Civil Rights' enforcement activities regarding within-school discrimination under Title VI.[2] The study was requested by the Chairmen of the House Committee on Education and Labor and its Subcommittee on Select Education.

The objectives pertinent to this paper include (1) determining the characteristics of discriminatory ability grouping and tracking practices; (2) assessing the extent of ability grouping that may be discriminatory in the nation's elementary and secondary schools; and (3) formulating policy recommendations.

This paper provides important information for parents, practitioners, and researchers. It combines the findings of discrimination investigations with research evidence on ability grouping and tracking practices to explain the standards such practices should meet to be legal under Title VI. In addition, the recommendation discussed in the paper should, if implemented, improve the Department of Education's enforcement of civil rights provisions that have a direct effect on the equality of educational opportunity in the nation's elementary and secondary schools.

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[1]The other civil rights statutes which OCR enforces include (1) Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex; (2) Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of handicapping condition; and (3) the Age Discrimination Act of 1975, which prohibits discrimination on the basis of age.

[2]Within-School Discrimination: Inadequate Title VI Enforcement by the Office for Civil Rights, July 1991 (GAO/HRD-91-85). I would like to acknowledge the significant contributions to this study by Jonathan H. Barker and Ella F. Cleveland.

CHARACTERISTICS OF RACIALLY DISCRIMINATORY ABILITY GROUPING

To determine the characteristics of racially discriminatory ability grouping and tracking practices, we conducted a content analysis of case file documents for selected Title VI elementary and secondary within-school discrimination investigations conducted by OCR during fiscal years 1983-89.[3] These included the 35 class-action complaint investigations which we identified as pertaining to ability grouping or tracking.[4]

The content analysis of case file documents indicated the basis on which OCR determined whether an ability grouping practice was discriminatory under Title VI. OCR makes such determinations by using two different legal approaches devised by the courts for proving discrimination: (1) disparate treatment (which analyzes the manner in which students are treated to determine if different races receive different treatment), and (2) disparate impact (which analyzes the effect of criteria or policies which appear to be neutral, but may have a disparate impact on students of one race).[5]

Disparate treatment analysis is often associated with efforts to find intentional discrimination. Until 1983, there was some question about whether OCR was required to show intentional discrimination in Title VI cases. In the 1983 Guardians decision,[6] the Supreme Court ruled that the effects (disparate impact)

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[3]These cases were closed with a "compliance" or "violation-corrected" Letter of Findings. OCR issues a compliance Letter of Findings if an investigation finds no violation has occurred. If a violation has occurred, OCR attempts to achieve voluntary compliance by negotiating a settlement with the school district before issuing a Letter of Findings. OCR calls this a pre-Letter of Findings settlement; it includes an agreement on a corrective action plan. OCR issues a violation-corrected Letter of Findings if a pre-Letter of Findings settlement is achieved. A violation-corrected Letter of Findings states that OCR currently considers the school district to be in compliance although a violation was found. This presumption of compliance, however, is contingent on the district's successful completion of the corrective actions that it agreed to take. OCR closes the vast majority of its investigations that identify violations in this manner.

[4]Class-action complaints allege discrimination against a group of people rather than a single individual.

[5]See Appendix I for a discussion of OCR's discretion to use these legal approaches.

[6]Guardians Association v. Civil Service Commission, 463 U.S. 582 (1983).

standard articulated in the Title VI regulation was valid and intent was not required to show a violation of the regulation.

We found that 23 of the 35 class-action ability grouping or tracking investigations we reviewed used disparate impact analysis and that nine of the investigations used disparate treatment analysis. In 3 investigations, we were unable to determine the kind of legal approach OCR used because of inadequate documentation in the case files.

How OCR Uses Disparate Treatment Analysis

A disparate treatment analysis in a Title VI within-school student assignment investigation generally follows two stages. First, the investigator determines whether the school district's assignment practice is "facially neutral", that is, whether it treats students equally regardless of their race, color, or national origin. If the practice is not facially neutral, OCR finds a violation on the basis of disparate treatment. Second, if the practice is facially neutral, the investigator determines whether the school district uses the practice uniformly for minority and nonminority students. If not, OCR finds a violation on the basis of disparate treatment. If no disparate treatment is found, OCR next determines if the practice has a disparate impact.

Because evidence of racially explicit student assignment criteria is often lacking, OCR is most likely to find violations on the basis of disparate impact rather than disparate treatment. The remainder of this paper is concerned with discrimination in terms of the disparate impact approach.

How OCR Uses Disparate Impact Analysis

Disparate impact analysis assesses whether facially neutral policies or practices have a discriminatory impact that cannot be justified. For OCR's purposes, a disparate impact analysis in a Title VI within-school student assignment investigation generally follows three stages.

In the first stage, the investigator determines whether the school district's assignment practice has a segregative effect, that is, whether the practice results in a statistically significant number of racially identifiable classrooms. Racially identifiable classrooms have a statistically disproportionate number of students of one race compared with the racial composition of the school or some other standard of comparison, such as a grade level. OCR has generally found a classroom to be racially identifiable if the percentage of minority students is 20 percent greater or less than

the racial composition of the whole school or particular grade level. If the investigator finds no segregative effect, OCR finds no violation. If the investigator finds a segregative effect, the analysis proceeds to the second stage. OCR closed 8 of the 23 disparate impact cases with a finding of no violation because a segregative effect was not found.

In the second stage, the investigator determines whether the student assignment practice can be educationally justified. OCR frequently uses the three criteria listed below to determine if ability grouping practices are educationally justified. These criteria were included in Education's implementing regulations for the Emergency School Aid Act (see app. II).[7]

-- Grouping must be based on nondiscriminatory objective measures which are educationally relevant for the purpose of the grouping. Such measures (1) treat minority and majority students equally, (2) provide an objective assessment of student ability or achievement level, and (3) pertain to the subject areas in which students are ability grouped (unlike a score on a composite test of basic skills).

-- Grouping must be determined by the nondiscriminatory application of the measures. The nondiscriminatory application of measures means that the measures are used consistently for minority and majority students so that, for example, students with the same test scores are ability-grouped at the same level.

-- The grouping must be validated by test scores or other reliable objective evidence indicating the educational benefits of such grouping. Evidence of educational benefit, such as improved academic achievement or mobility to higher-level classes, demonstrates whether the ability grouping practice benefits the students in the lower-groups.

For example, under the first criterion for assessing educational justification, OCR has required that a student be assigned to ability-grouped classes on the basis of objective measures of the student's ability in each of the relevant subject areas (such as subject-specific tests). In contrast, it is not educationally justified, OCR has found, to assign a student to ability-grouped classes on the basis of (1) a single objective measure of ability across subject areas, such as a composite test score, or (2) subjective measures, such as teacher recommendations.

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[7]The Emergency School Aid Act was repealed, and its implementing regulations removed, in 1981, when the Emergency School Aid program was consolidated with other categorical grant programs under the Education Consolidation and Improvement Act. This act consolidated 28 categorical grants into a single block grant known as Chapter 2.

Using the educationally justifiable approach of assigning students on the basis of objective measures relevant to specific subject areas, it is unlikely for a given student to remain with the same classmates for all subjects--as is the case with block scheduling. Under block scheduling, students are assigned to ability-grouped classes for all academic subjects with no regrouping; as a result, they remain with the same classmates throughout the day.

If the investigator determines that the student assignment practice is not educationally justified, OCR finds a violation. This occurred in 11 of the 23 disparate impact cases we reviewed. If the investigator establishes a sufficient justification, the analysis proceeds to the third stage.

In the third stage, the investigator determines if an alternative method of assigning students could be used that would have a less disparate effect on minority students than the current method. An example of an alternative method might be to ability group students for reading and math classes only rather than for all subjects. If the investigator identifies no alternative method, OCR finds no violation. We found no examples of violations based solely on the availability of an alternative method.

Why OCR Found Ability Grouping Practices to be Discriminatory

OCR found ability grouping practices to be discriminatory after establishing a segregative effect in 11 of the 23 disparate impact cases. In these cases, OCR found that school districts' assignment practices failed to meet one or more of the three criteria for educationally justified ability grouping. In 10 of the 11 cases, OCR determined that the school district failed to base its ability grouping on educationally relevant objective measures. Most commonly these districts used, as the primary basis for grouping, (1) a single measure of ability (for example, a reading subtest or composite score from a standardized test) for assigning students to all or most academic classes, or (2) only subjective measures, such as teacher recommendations.

In 4 of the 11 cases where discrimination was found, OCR determined that the school district failed to base its grouping on the nondiscriminatory application of its measures. For example, OCR found a district that assigned students on the basis of test scores to be in violation of Title VI when higher-ability and lower-ability groups included students with overlapping scores. In such cases, minority students placed in lower groups had scores comparable with nonminority students placed in higher groups.

In two of the 11 cases, OCR also determined that the school district was unable to demonstrate that its assignment practices

resulted in educational benefit for students in the lower-ability groups. For example, OCR found that school districts could not demonstrate that the placement of students in lower-ability groups resulted in (1) upward mobility to higher groups, or (2) improved academic achievement.

EXTENT OF ABILITY GROUPING THAT MAY BE DISCRIMINATORY

To assess the extent of ability grouping that may be discriminatory, we analyzed nationally representative survey data on school's grouping practices collected by the Center for Research on Elementary and Middle Schools (CREMS) at Johns Hopkins University.[8] The CREMS data, collected from principals of schools with a seventh grade (middle-grade schools), indicate that about 10 percent (about 1,700) of the nation's middle-grade schools assign their 6th, 7th, or 8th grade students to ability-grouped classes using block scheduling.[9]

The survey data also indicate that the practice of ability grouping for all subjects is more often found in schools with enrollments of more than 20 percent African-American and Hispanic students.[10] We found that schools which block schedule students into ability grouped classes most often rely on a single measure, such as a composite test score, as the basis for assigning students. OCR has found block scheduling to ability grouped classes in violation of Title VI regulations when it results in disproportionate numbers of minority students assigned to lower-ability classes.[11]

Since the CREMS data does not indicate the racial composition of classrooms, we were unable to determine whether the schools' grouping practices result in racially identifiable classrooms, that is, whether they had a segregative effect. Thus, the CREMS data provides evidence of only possible discrimination.

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[8]Education in the Middle Grades: A National Survey of Practices and Trends, Center for Research on Elementary and Middle Schools, Johns Hopkins University, 1988.

[9]This analysis excludes middle-grade schools with fewer than 31 students per grade.

[10]Jomills Henry Braddock II, Tracking of Black, Hispanic, Asian, Native American, and White Students: National Patterns and Trends, Baltimore: Johns Hopkins University Center for Research on Effective Schooling for Disadvantaged Students, 1989.

[11]See, for example, In the Matter of Dillon County School District No. 1 and South Carolina State Department of Education, Docket No. 84-VI-16 (1986), affirmed on appeal, Docket No. 84-VI-16 (1987).

To assess the extent of racially identifiable classrooms and provide another indication of possible discrimination, we analyzed the most recent nationally representative data available (1986) from the biennial OCR surveys of schools and districts.[12] OCR conducts these surveys to gather evidence of possible noncompliance with federal civil rights statutes and regulations.

OCR's 1986 surveys indicate that more than half of the nation's districts had elementary schools with one or more racially identifiable classrooms in their highest or lowest grade.[13] The number of elementary schools and districts with one or more racially identifiable classrooms based on the racial composition of the applicable grade is shown in table 1. We provide data for disproportions at the 20-percent threshold level typically used by OCR as well as at the higher threshold levels of 30 and 40 percent.

Table 1: OCR Survey Data Show Many of the Nation's Elementary Schools Have Racially Identifiable Classes

Amount of Disproportion[a] (in percent)	Elementary Schools[b]		School Districts	
	Number	Percent	Number	Percent
20	17,167	29	8,586	54
30	13,857	23	7,694	49
40	12,436	21	7,332	46

[a]These percentages should be read as the percentage given or greater.
[b]Schools with both elementary and secondary programs are included under elementary schools.

POLICY RECOMMENDATION: TITLE VI REGULATIONS NEEDED

No federal regulatory guidance exists concerning schools' ability grouping and tracking practices. Consequently, state and local education agencies may not know which ability grouping and tracking practices are acceptable under law and which are not.

[12]Elementary and Secondary Education Civil Rights Survey, Office for Civil Rights, 1986.

[13]OCR collects data only for elementary schools' highest and lowest grade levels, not including kindergarten or grades above the 6th. Our analyses are, therefore, based on data from only two grade levels per school.

Title VI regulations include no provisions concerning the practices schools should use in assigning students to classes on the basis of academic ability or achievement level. Previous education regulations, however, implementing the Emergency School Aid Act of 1976 (removed in 1981), had specified allowable practices (see app. II). The Emergency School Aid Act regulations required, among other things, that ability grouping practices meet the three criteria used by OCR to determine whether such practices are educationally justified.

In contrast to Title VI, current regulations implementing section 504 of the Rehabilitation Act of 1973 specify practices schools should use in assigning students with physical or mental impairments. These regulations require, among other things, (1) validation of tests used for evaluation and placement, (2) placement of children in regular classes to the greatest extent possible, (3) parental notification of placement decisions, and (4) periodic reevaluation of students.

To provide federal guidance to state and local education agencies, GAO recommended that the Secretary of Education issue Title VI regulations which identify practices schools should use for assigning students to classes on the basis of academic ability or achievement level. The Department of Education, however, disagrees with this recommendation and has not yet implemented it.

OCR'S DISCRETION TO USE DISPARATE TREATMENT OR IMPACT ANALYSIS

OCR's discretion to use a disparate impact analysis or a disparate treatment analysis in a Title VI investigation is derived from (1) the Title VI statute, (2) the Title VI implementing regulations, and (3) subsequent court decisions.

Title VI of the Civil Rights Act of 1964 provides that "[no] person...shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance."[14] Education and the courts have interpreted this language to prohibit intentional discrimination (disparate treatment).

Title VI implementing regulations, however, also prohibit school districts receiving federal funds from using "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin...[emphasis added]."[15] Education and the courts have interpreted this language to prohibit practices which, although not intentionally discriminatory, have a disparate impact or discriminatory effect.

In 1974, the Supreme Court held in Lau v. Nichols that Title VI forbids the use of federal funds not only in programs that intentionally discriminate on racial grounds but also in those that have a disparate impact on racial minorities.[16]

The Lau decision, however, was thrown into question by the Supreme Court's 1978 Bakke decision, which suggested that Title VI reached no further than prohibiting acts of intentional discrimination.[17]

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[14]42 U.S.C. 2000d.

[15]34 C.F.R. 100.3(b)(2) (1989).

[16]Lau v. Nichols, 414 U.S. 563 (1974).

[17]Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

In 1983, the Supreme Court's Guardians decision held that the Title VI statute alone required proof of intentional discrimination.[18] The Court, however, also upheld the section of the Title VI regulations which incorporated a disparate impact approach to proving discrimination. The Court's decision in Guardians implies that while intentional discrimination is prohibited by statute, the prohibition of acts or policies resulting in disparate impact is discretionary with each agency which enforces Title VI.[19]

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[18]Guardians Association v. Civil Service Commission, 463 U.S. 582 (1983).

[19]Guardians was not a unanimous decision. Five Justices believed a violation of the regulations may be established by proof of disparate impact, while four Justices believed that prohibiting such unintentional discrimination exceeded the Department of Education's discretion.

Appendix II

PROVISIONS ON ABILITY GROUPING IN THE EMERGENCY SCHOOL AID ACT

The Emergency School Aid Act (ESAA) of 1976 provided financial assistance through a categorical grant to school districts undergoing desegregation. The act and its regulations were repealed by the Education Consolidation and Improvement Act (ECIA) of 1981 which consolidated 28 categorical grant programs into a single block grant known as Chapter 2. ESAA provisions prohibited certain kinds of student assignment practices and procedures. Before qualifying for an ESAA grant, a school district had to demonstrate to OCR that it was in compliance with the act and its implementing regulations.

ESAA prohibited school districts that received ESAA funds from using procedures for student assignment that result in the separation of minority group children from nonminority group children for a substantial portion of the school day. The act also provided that this did not prohibit the use of bona fide ability grouping as a standard educational practice.[20] The act's implementing regulations defined bona fide ability grouping to be

-- based on nondiscriminatory, objective standards of measurement that are educationally relevant to the purpose of such grouping;

-- determined by the nondiscriminatory application of the standards and maintained for only that period of the school day necessary to achieve the purposes of the grouping;

-- designed to meet the special needs of the students in each group and to bring the academic achievement of students in lower groups to or above the appropriate grade level; and

-- validated by test scores or other reliable, objective evidence indicating the educational benefits of the grouping.[21]

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[20]20 U.S.C. 3196(c)(1)(C)(1976).

[21]34 C.F.R. 280.23 (1982) (removed effective October 1, 1982).